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No. 98-570

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In The

Supreme Court of the United States

October Term, 1998

BANK OF CHINA,

Petitioner,

vs.

VOEST-ALPINE TRADING USA CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a foreign sovereign who has engaged in a commercial transaction with an American corporation, and who then fails to remit funds into the corporation's designated bank account in the United States, waives its sovereign immunity under the commercial activity exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2).

STATEMENT PURSUANT TO RULE 29.6

There are no nonwholly owned subsidiaries of Respondent. Voest-Alpine Intertrading AG is Respondent's parent.

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APPENDIX

Appendix A — UCP 500 Article 10(a)-10(b) 1a

STATEMENT OF THE CASE

Respondent adopts the United States Court of Appeals for the Fifth Circuit's recitation of the factual and procedural background of this proceeding.[1] Petitioner's rendition of the facts contains misstatements or errors that are clarified in the following discussion. These errors demonstrate that Petitioner's complaints are based upon factual findings of the District Court and the Fifth Circuit, and not the Fifth Circuit's refusal to impose the "legally significant act" test to the direct effect exception to foreign sovereign immunity.

A. The Question Presented For Review Is Based Upon The Factual Analysis Of The Courts Below, Not The Propriety Of Imposing The "Legally Significant Act" Test, As Petitioner Suggests.

Petitioner's rendition of the question presented is inaccurate. The question presented here is the same question articulated by the Fifth Circuit in the opening paragraph of its opinion. [App. at 2a]. In this case, a foreign sovereign engaged in an admittedly commercial transaction (issuance of an irrevocable letter of credit) with an American corporation. The issue is whether Petitioner waived its sovereign immunity by failing to pay the Letter of Credit to Respondent's properly designated United States bank account. Respondent submits that immunity was waived. More importantly, at least at this point, Petitioner's fact bound contentions have been rejected by the District Court and by the Fifth Circuit.

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1. The Opinion of the United States Court of Appeals for the Fifth Circuit is reprinted at pages 1a through 22a of Petitioner's Appendix (hereinafter, "Appendix"). The factual and procedural background of the Opinion is located at pages 2a through 7a.

There are four basic flaws in Petitioner's analysis. First, the Fifth Circuit's opinion did not hold that mere consequential financial loss of an American plaintiff is sufficient to sustain jurisdiction under the "direct effect" exception. In fact, the Fifth Circuit expressly stated it was *not* deciding this very issue. [App. at 17a n.11].

Second, Petitioner's statement of the question presented suggests this Court's opinion in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), included a requirement that some "legally significant act" occur within the United States to fulfill the direct effect exception. While several circuit courts seemingly have adopted a "legally significant act" test, it does not appear to be part of this Court's decision in *Weltover*.[2]

Third, Petitioner's statement of the question suggests no "legally significant act" occurred in the United States, despite the fact the District Court and the Fifth Circuit found that payment on the letter of credit was to be made to Respondent's account in Houston, Texas.[3]

Fourth, Petitioner fails to address the fact it carried the ultimate burden of persuasion in disproving the FSIA exception. *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir. 1992). Both the District Court and the Fifth Circuit found Petitioner failed in this burden. [App. at 18a, 26a].

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2. The Second Circuit has acknowledged that this Court did not "expressly adopt" the "legally significant acts" test in *Weltover*. *Antares Aircraft v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993).

3. The District Court also found that the facts plead by Respondent supported jurisdiction under the first clause of § 1605(a)(2). [App. at 25a n.1].

B. Respondent's Designation Of A Place Of Payment In The United States Contradicts Petitioner's Claim That Performance Was To Occur In China.

Petitioner attempts to convince this Court the contractual place of performance was in China. This is illustrative of the Petitioner's challenge to the factual findings, rather than the application of the law. Petitioner asserts the Letter of Credit called for presentment of documents at the Jiangyin Sub-branch's counters. [Pet. at 3]. This assertion ignores the terms of the Letter of Credit. The Letter of Credit at issue here did not designate a place of payment.

The Letter of Credit specifically provides it is to be governed by the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, Publication No. 500 ("UCP 500"). Under the UCP 500 Article 10(a), all credits must clearly indicate whether they are available by: (1) sight payment; (2) deferred payment; (3) acceptance; or (4) negotiation. The Letter of Credit in the instant case was a "negotiation credit," stating "credit available by negotiation of beneficiary's draft. . . ."[4] Under UCP 500 Article 10(b), a credit must also specify a Nominated Bank which is authorized to pay or negotiate the credit. In the case of a freely negotiable credit, "any bank is a Nominated Bank." UCP 500 Art. 10(b).

Because the Letter of Credit was freely negotiable, it is inaccurate for the Petitioner to suggest China was the designated place of payment. Petitioner placed no limitations on where the Letter of Credit could be negotiated. It is undisputed that Respondent designated its United States account as the place of Petitioner's final contractual obligation — payment of the

4. The Letter of Credit is attached to Respondent's Amended Complaint. [Doc. 40, p. 9].

Letter of Credit — and Petitioner has never objected to this designation. As noted by the Fifth Circuit, is was Petitioner's burden to prove otherwise. [App. at 18a].

C. Respondent's Cause Of Action Is Based On Petitioner's Failure To Pay Rather Than Where The Rejection Occurred.

The elements of Respondent's cause of action are: (a) issuance of the Letter of Credit; (b) timely presentation of necessary documents; and (c) failure to pay on the Letter of Credit. [App. at 9a]; *See also Goodman Holdings v. Rafidain Bank,* 26 F.3d 1143, 1146 (D.C. Cir. 1994) (listing proper elements for suit on letter of credit).

Respondent's claim is predicated upon Petitioner's failure to make payment of USD 1.2 million to Respondent's United States bank account, not upon Petitioner's failure to reject Respondent's presentation within the seven banking day deadline imposed by the UCP 500.[5] Petitioner attempts to couch the suit in terms of where it failed to timely reject documents, which occurred in China, and not where it failed to make payment, which occurred in the United States. This is another illustration of Petitioner's effort to challenge the Fifth Circuit's factual findings, rather than the legal analysis.

D. Petitioner Mischaracterizes The Opinion And Analysis Of The Fifth Circuit.

Petitioner makes several interpretations of the Fifth Circuit's opinion in this case which are erroneous.

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5. Petitioner apparently continues to assert it rejected Respondent's documents in a timely fashion. This is untrue, as noted by the Fifth Circuit. [App. at 4a].

First, Petitioner repeatedly suggests the Fifth Circuit recognized the existence of the "legally significant act" test in *Weltover*. [Pet. at 6-7]. This suggestion is incorrect. The Fifth Circuit expressly stated that "[t]he legally significant act requirement is unexpressed in the third clause and, thus, has been renounced by *Weltover*." [App. at 13a].

Second, Petitioner represents that the Fifth Circuit "expressly acknowledged Petitioner's contentions that, in this case, no legally significant act took place or was to take place in the United States. . . ." [Pet. at 6]. This is simply untrue. The Fifth Circuit did not hold that a "legally significant act" was lacking from the instant case, but rather stated that the "legally significant act" test has not been adopted by the Fifth Circuit. The Fifth Circuit said *Weltover* expressly jettisoned " 'any unexpressed requirement[s]' to the third clause," including, by implication, the "legally significant act" test. [App. at 13a].

The Fifth Circuit correctly recognized and noted that applying the "legally significant act" test as a requisite element of the third clause would render the third clause meaningless ("requiring the effect to have a causal nexus with some legally significant act in the United States merges the third clause into the second clause of the commercial activity exception.") [App. at 14a-15a]. The Fifth Circuit further addressed this point by framing the jurisdictional issue as "whether the Bank of China's failure to pay occurred in the United States (first clause) or caused a direct effect in the United States (third clause)." [App. at 9a]. The Fifth Circuit properly recognized that the question of where the "legally significant act" occurred (such as the issue of where the failure to pay took place) is a question more properly reserved for an application of clause one of the commercial activity exception.[6] This analysis was reinforced

6. At least one commentator has recognized that the question of (Cont'd)

by the Fifth Circuit's restatement of the holding in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111-12 (5th Cir. 1985). In *Callejo*, the Court held the "direct effect" clause of the commercial activity exception (clause three) did not inquire as to the situs of payment. [App. at 16a]. In short, imposing the "legally significant act" requirement on the "direct effect" clause would improperly result in a "meaningless construction" of the commercial activity exception. [App. at 15a].

Finally, Petitioner attempts to simplistically distill the analysis of the Fifth Circuit as only requiring an American corporation to suffer some financial loss in order to provide the requisite direct effect. [Pet. at 7]. Petitioner suggests this was the foundation of the Fifth Circuit's decision. This suggestion is incorrect as the Fifth Circuit refused to address whether any nontrivial financial loss suffered by an American plaintiff, regardless of where the law was incurred, is sufficient to constitute a direct effect under the third clause. [App. at 17a n.11]. As noted by the Fifth Circuit, *Callejo* did *not* hold that mere financial loss suffered by an American plaintiff is alone sufficient to support FSIA jurisdiction. [App. at 17a n.11]. It is difficult to reconcile Petitioner's rendition of the Opinion with the actual text.[7]

(Cont'd)

where a legally significant portion of the transaction occurred is relevant to the first clause of the commercial activity exception. Richard Wydeven, *The Foreign Sovereign Immunities Act of 1976: A Contemporary Look at Jurisdiction under the Commercial Activity Exception*, 13 REV. LITIG. 143, 150 (1993).

7. The foundation for the Fifth Circuit's decision rests on several factors notably absent from Petitioner's account. The Fifth Circuit summarized the factors culminating in its decision with:

(Cont'd)

REASONS FOR DENYING THE WRIT

Petitioner artfully attempts to characterize the issue before this Court as a prime candidate for review by suggesting the Fifth Circuit has created a new rule that squarely conflicts with the Second, Eighth, Ninth, Tenth, and District of Columbia Circuits. [Pet. at 7]. Petitioner repeatedly asserts that the Fifth Circuit has created a rule where an American plaintiff need only show some nontrivial harm in order to fall within the direct effect exception. [Pet. at 7]. A fair reading of the Fifth Circuit's opinion does not support Petitioner's contentions, and reveals that Petitioner has misstated the question presented. The actual question presented in this case does not warrant review by this Court.

Petitioner failed to meet its burden of persuasion in disproving the existence of the commercial activity exception,

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(Cont'd)

> Voest-Alpine is an American corporation that suffered a nontrivial financial loss in the United States in the form of funds not remitted to its account at a Texas bank. Voest-Alpine expressly instructed the Bank of China to wire payment on the letter of credit directly into Voest-Alpine's bank account in Houston, if the necessary documents were conforming.
>
> * * *
>
> Clearly, then, the Bank of China's failure to pay on the letter of credit caused a direct effect in the United States, that is, Voest-Alpine's nonreceipt of funds in its Texas account followed as an "immediate consequence" of the Bank of China's actions.

[App. at 18a].

and seeks another opportunity to do so before this Court. Petitioner has steadfastly maintained that the contractual place of performance — meaning the place of payment — was to be in China. Petitioner has improperly analyzed the elements of Respondent's cause of action, ostensibly to concentrate on events that occurred solely in China. Both the District Court and the Fifth Circuit disagreed with these contentions. The basis of Petitioner's complaint is not the fact the Fifth Circuit refused to adopt the "legally significant act" test. Instead, the basis is Petitioner's belief that both the District Court and the Fifth Circuit's opinion contain erroneous factual findings on the place of payment under the Letter of Credit, and Petitioner's disagreement with the elements of Respondent's cause of action. Under these circumstances, there is no cause for this Court's review. SUP. CT. R. 10(c).

Additionally, even if this Court were to look past Petitioner's flawed analysis and determine a split in the circuits does exist, the facts in this case support jurisdiction under the "legally significant act" test. There is no dispute that Respondent designated its United States account as the place of payment. Nothing in the Letter of Credit prohibited this designation. As a negotiable credit, Petitioner essentially invited this designation, a fact acknowledged in oral argument. It was Petitioner's burden to show this designation was inappropriate, and it did not. [App. at 18a]. Having failed in this burden, there is no good reason for this Court to give Petitioner another opportunity to argue a factual question that must be accepted as true.[8]

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8. The appeal arises from the District Court's denial of a motion to dismiss pursuant to FED. R. CIV. P. 12(c). All of the factual contentions contained within Respondent's pleadings must be accepted as true. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 351, 113 S. Ct. 1471, 1474, 123 L. Ed. 2d 47 (1993).

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — UCP 500 ARTICLE 10(a)-10(b)

ICC Uniform Customs and Practice for DOCUMENTARY CREDITS

Article 10

Types of Credit

a All Credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation.

b i. Unless the Credit stipulates that it is available only with the issuing Bank, all Credits must nominate the bank (the "Nominated Bank") which is authorised to pay, to incur a deferred payment undertaking to accept Draft(s) or to negotiate. In a freely negotiable Credit, any bank is Nominated Bank.

Presentation of documents must be made to the issuing Bank or the Confirming Bank, if any or any other Nominated Bank.

ii. Negotiation means the giving of value for Draft(s) and/or document(s) by the bank authorised to negotiate. Mere examination of the documents without giving of value does not constitute a negotiation.